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No. 94-631

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1994

ZELL MILLER, Governor of the State of Georgia, et al.,

Appellants,

versus

DAVIDA JOHNSON, et al.,

Appellees.

and

UNITED STATES OF AMERICA and LUCIOUS ABRAMS, JR., et al.,

Intervenors.

On Appeal From The United States District Court For The Southern District Of Georgia

BRIEF OF APPELLANTS MILLER, ET AL.

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QUESTIONS PRESENTED

I. Whether *Shaw* renders a redistricting plan unconstitutional regardless of what its shape may be and regardless of whether a district line generally is explainable on grounds other than race.

11. Whether the Equal Protection Clause is violated simply because Georgia intentionally constructed a majority-minority district for the purpose of affording minority candidates reasonable opportunities to be elected.

III. Whether predictable, objective criteria must be used in applying *Shaw* and, if so, whether such criteria are satisfied by Georgia's eleventh district.

IV. Whether Georgia's eleventh district would pass constitutional muster even if *Shaw* required a more intensive scrutiny of a district line, since the eleventh district throughout runs along boundaries that have meaning independent of race.

PARTIES TO THE PROCEEDING

Plaintiffs are Davida Johnson, Pam Burke, Henry Zittrouer, George L. DeLoach, George Seaton.

Defendants are Zell Miller, in his Official Capacity as Governor of the State of Georgia, Pierre Howard, in his Official Capacity as Lieutenant Governor of the State of Georgia and President of the Georgia Senate, Thomas Murphy, in his Official Capacity as Speaker of the Georgia House of Representatives, and Max Cleland, in his Official Capacity as Secretary of State of the State of Georgia.

The following individuals intervened as defendants: Lucious Abrams, Jr., Rev. G.L. Avery, William Gary Chambers, Sr., Judy Lambers, Rita Valenti, Karen Watson.

The United States of America also intervened as a defendant.

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The opinion of the three-judge district court is reported at 864 F.Supp. 1354 (S.D. Ga. 1994). The opinion is also reproduced in appellants' Jurisdictional Statement. (J.S. App. 1-101)

JURISDICTION

This is an appeal from an order and judgment of a three-judge court striking down Georgia's congressional redistricting legislation as unconstitutional and entering equitable and declaratory relief. Final judgment was entered on September 12, 1994. Appellants' notice of appeal was filed on September 14, 1994, and probable jurisdiction was noted by this Court on January 6, 1995. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This appeal involves the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution which provides, "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

This appeal also involves Sections 2 and 5 of the Voting Rights Act of 1965, 42 U.S.C. §§ 1973 & 1973c. The text of these statutes is set forth at J.S. App. 103-05.

I. STATEMENT OF THE CASE.

A. Proceedings Below.

Plaintiffs filed their complaint challenging Georgia's eleventh congressional district on *Shaw* grounds on January 13, 1994. Plaintiffs sought to enjoin qualifying for the 1994 congressional elections, and that motion was denied

on April 19, 1994, after hearing. Trial was held July 21-28, 1994. The district court entered judgment on September 12, 1994, in favor of plaintiffs. Circuit Judge J.L. Edmondson dissented. The majority also ordered that a court-ordered reapportionment plan be implemented immediately for the 1994 elections, and that the results of the July primary election be set aside in the eleventh district. (J.S. App. 90) A notice of appeal was filed by the Governor, Lieutenant Governor and Secretary of State on September 14, 1994, and the Supreme Court granted appellants' motion to stay on September 23, 1994.

B. Statement of Facts.

Georgia Reapportionment in 1991-92: An Overview. According to the 1990 census, Georgia's population was approximately 6,480,000 people, 27 percent of whom were black. (Jt. App. 9) This entitled the State to an increase in its number of representatives to eleven. Legislative committees in both the Georgia House and Senate began the reapportionment process early in 1991 by adopting guidelines to be followed for new redistricting plans. (Jt. App. 11-12, 65, 72) These guidelines required, among other things, that all redistricting proposals follow the geographic boundaries used by the Census Bureau; that plans not dilute minority voting strength; and that all districts be composed of contiguous areas. (*Id.* & Jt. App. 12) The guidelines also provided that, if the foregoing criteria were met, then efforts to maintain political subdivisions intact and to avoid pitting incumbents against one another could be made. Finally, the guidelines specified that election precinct boundaries should serve as the

basic building blocks for constructing districts – so as to minimize voter confusion and the cost of election administration – but that these precincts could be split where necessary. Where precinct boundaries were split, district lines should then follow census blocks. (*Id.* & Jt. App. 12-13) *The General Assembly's guidelines were followed without exception in drawing the eleventh congressional district.* (P.I. Tr. 81-88)

During the entire apportionment process, dozens and dozens of congressional proposals were made by members of the General Assembly. These plans included from one to three majority black districts. (Jt. App. 13) The plan actually enacted by the General Assembly in 1991 had two majority black districts. This plan was submitted to the Department of Justice under Section 5, but was objected to on January 21, 1992. A second plan was enacted shortly thereafter, but was rejected by the Department on March 20, 1992. (Jt. App. 19, 54, 120) A third plan was enacted on March 31, 1992 and approved by the Department on April 1, 1992. This third and final plan contains three majority-minority districts. It is this plan that is before the Court. The demographics of the three majority black districts are as follows:

District Number	Total Pop % Deviation	Black Pop % of Total	VAP % of Total	Black VAP % of VAP
2*	591740 0.48	335082 56.63	415807 70.27	217571 52.32
5	586485 -0.41	365206 62.27	440910 75.18	253413 57.47
11	586201 -0.46	375586 64.07	413419 70.53	249534 60.36

*Without Fort Benning, black percentage is 57.83 percent of population and black VAP is 53.46 percent. (Jt. App. 19-20)

The percentage of black registered voters is somewhat less than the percentage of the entire population (or the voting age population) that is black. The registered voter percentages by race in these three districts are as follows:

Congressional District	Black Registered Voters Percentage
2	45%
5	54%
11	57% (Def. Jt. Ex. 21)

The politics and process of reapportionment. The evidence in this case is undisputed as to one point: Statewide reapportionment is a uniquely complex legislative act. As the witnesses testified, reapportionment is so complex and intensely "political" because of the great variety of opinions, views and interests among the 236 individual members of the General Assembly. With other legislation, the variety of views is few, often only two. Georgia's Speaker of the House, Representative Thomas

Murphy, has a special historical perspective on this issue since he has been a member of the General Assembly since this Court established the one person/one vote rule in the 1960's, and he has thus been through every modern reapportionment. (Tr. II, pp. 60, 91, 101-02) Speaker Murphy testified as follows:

> Q. Is reapportionment like just a regular kind of issue when it comes up to the General Assembly, like criminal legislation or anything else, or is it different in the way it all operates?
>
> A. No, sir. It's vastly different. . . .
>
> In an issue, say a criminal statute, you're either for it or against it. [In reapportionment,] you want to change this county to this place and this one to this one. There are so many various issues in this precinct or so many various issues involved in it, it's not just a one-issue thing. There's hundreds of issues because there are hundreds of people wanting their property and their county in a different district. . . .
>
> Q. And that just makes reapportionment a much, much more difficult, complicated legislative act?
>
> A. It does. (Tr. II, pp. 92-93)

Race is a political factor in reapportionment in Georgia. The essential purpose of reapportionment is to divide up all the competing interests of the members of the House and Senate and their constituents. It is undisputed that race is one of the factors that has routinely been considered in Georgia reapportionment. Linda Meggers has been the main staff person in the Legislative

Reapportionment Office in Georgia since 1971, and she has been intimately involved in all state-wide reapportionments and hundreds of local reapportionments since then. She is now the Director of the office. According to her testimony, race is a factor that is invariably considered. That's part of Georgia's real world political landscape:

> Q. And race has always been a part of reapportionment?
>
> A. Yes, sir. (Tr. II, p. 120)

In this reapportionment, African-American legislators in particular were concerned that black voters have an effective chance of electing representatives of their choice. Given the political realities that exist in Georgia today, they perceived this as requiring the creation of majority-minority districts. (Tr. IV, pp. 236-40) This view is not at all limited to minority members of the General Assembly. To the contrary, there is no evidence that a single member of the General Assembly questioned the value of, if not the absolute need of, having majority-minority districts if Georgia was to have minority representatives. At the very outset of the reapportionment process in 1991, there was a broad consensus in the General Assembly – among whites and blacks alike – that a second majority-minority congressional district should be created in addition to the one that existed in Atlanta under the previous reapportionment. (Tr. II, p. 123) Moreover, to draw a second majority black congressional district, it was necessary to combine African-American populations from three of Georgia's urban areas. (Tr. II, p. 152) The consensus in the General Assembly was that such a district arose most naturally in east central Georgia, which would include black voters from south DeKalb

County in the Atlanta metropolitan area on its western edge. (Tr. II, pp. 151-52) Such a district was included in the first plan enacted by the General Assembly in 1991. It includes the bulk of the area in the present eleventh district. (Jt. App. 51, 57)

The only real dispute concerning the general question of race and congressional reapportionment related to whether Georgia should have two or three majority black districts. Most black members of the General Assembly and some whites advocated that three such districts should be drawn in order to fairly reflect the African-American population in Georgia. (Tr. III, pp. 234-35; Tr. IV, pp. 247-248)

What the lines of the eleventh congressional district are based on. Proposals by individual legislators often contained significant irregularities, few intact counties, and other aberrations. No such plan was ever enacted by the General Assembly, however. To the contrary, and largely through the work of the State Reapportionment Office, the plans of individual legislators were reworked to make them much more regular. The eleventh district line that is before this Court is a product of this kind of concerted reworking to achieve as much regularity as possible; to abide by existing political boundaries where possible; and to otherwise follow significant local physical features. While it is undeniable that race was a large factor in the overall architecture in the district, it is undisputed that Ms. Meggers and the reapportionment office made every effort "humanly possible" to make the eleventh district line reasonable and regular. (Tr. II, p. 133)

Of particular significance, the majority black eleventh district thus drawn kept Georgia's counties intact to the

maximum extent possible. While urban counties are split, it is much less disruptive to split those than rural ones, and it was inevitable that urban counties be split given the population distribution in Georgia. (*Id.* at 228-29) The eleventh district thus encompasses fourteen whole, intact counties and portions of eight others. The great bulk of the eleventh district lies within intact counties. *In total, 86.6 percent of the entire area of the eleventh congressional district is comprised of whole counties.* This figure compares very favorably to all of Georgia's other congressional districts. *See* Table 1, App. 1.

Similarly, the reapportionment office and the General Assembly located the great majority of the congressional district line on the most traditional of all boundaries – the state line, county lines, and city limits. *Overall, 71.1 percent of the eleventh congressional district line runs right along boundaries of the state, counties, or municipalities.* Once again, this percentage compares favorably with Georgia's other congressional districts. *See* Table 2, App. 2.

The trial court's majority opinion simply ignored this evidence.

The specific contours of the eleventh district. Extensive efforts were made by the State to make the district line conform to local boundaries and physical features wherever it deviated from county boundaries themselves. The record is replete with detailed evidence that describes precisely how this was done and where the line in fact is located. This evidence, too, was simply ignored by the district court.

Here again, the testimony of Reapportionment Director Meggers is pertinent. While acknowledging the general objective of enacting a majority-minority district – a

fact never in dispute – she testified that every effort was made to make the district as regular as possible. She herself did much of this work. For example, referring to the three split urban counties, Ms. Meggers testified:

> A: . . . In this instance [Richmond County], and I think similarly in Dekalb and Chatham, when we finally drew the eleventh district as it was configured, we cleaned it up as much as possible. When I say that, we made a judgment to put as many counties back together to begin with that, those are the rural counties that are not as densely populated, etc., to try to maintain their integrity as a political unit. We were going to have to divide these metro areas into more than one district anyway. (Tr. I, pp. 96-97)

Similarly, Ms. Meggers testified that the eleventh district is a "finally honed line," and that she drew the line "trying to clean the plan up, get back to whole counties as much as I could." (*Id.*)

As a result of these efforts, the evidence shows that, even in those places where the line deviates from a county line and is less geometrically regular, it is located right on other appropriate local features. For example, where the boundary of the eleventh district leaves county lines, it usually follows election precinct lines. Precinct lines in Georgia are determined by *local* authorities, and by law and by fact, those lines must be based upon known, recognizable physical features (*e.g.*, roads, railroad tracks, rivers and the like). (Tr. II, pp. 125-128) *There is no evidence that anyone ever drew a single precinct line on the basis of race.* A congressional district line following

these precinct lines is *ipso facto* explainable on grounds other than race.

While the majority's findings do not address the actual configuration of the line beyond the most general characterizations, it is important to appreciate just where the line really runs. Following is what the uncontradicted evidence shows about the actual location of the eleventh district in each of the eight split counties where it deviates from a county boundary.

1. *DeKalb County.* While DeKalb County is partly included in the eleventh district in pursuit of the overall objective of creating a majority-minority district, the specific boundary line in DeKalb County is based on considerations other than race. Possibly the most irregular appearing part of the entire eleventh district lies in western DeKalb County where a small rectangular area sits atop the rest of the eleventh district. *But as peculiar as this line may be, it is peculiar precisely because it follows the existing Atlanta City boundary.* (Tr. II, p. 197)

Moving from this rectangle eastward through DeKalb County, the line follows the city limits of Decatur. This again adds a degree of irregularity to the line in visual appearance, but again this irregularity is wholly reasonable. No municipality in all of DeKalb County was split. Neither were any precinct boundaries split. (Tr. II, p. 204) In another area of DeKalb where one boundary of the district appears irregular, it in fact follows some of the largest highways in the State of Georgia, I-285 and the Stone Mountain Freeway. At the narrowest point of the district in DeKalb County, the district is in fact bounded on one side by the city limits of Avondale Estates and on

the other by a major interstate highway, entirely reasonable delineations with independent, non-racial significance. (Tr. II, pp. 199-200)

Non-racial considerations also played an important part in the configuration of the rest of the line in DeKalb County. Black voters in the City of Atlanta and the City of Decatur were *omitted* from the eleventh congressional district because city limits lines were followed. The North Redan precinct was included at the request of the Chairman of the Senate Reapportionment Committee, Eugene Walker (who is black), simply because his son lived there. (Tr. II, p. 202) That precinct is 73 percent white. (Defs. Jt. Ex. 21, p. 129.) Moreover, this precinct is an extremely large one. It contains just over 4,000 voters, which is about 1-1/2 percent of all of the voters in the entire district. (*Id.* pp. 129, 139) Similarly, large precincts in the southeastern corner of DeKalb County are included in the eleventh congressional district, even though predominately white, in order to follow county boundaries. (Tr. II, pp. 202-04)

2. *Henry County.* A portion of Henry County was included in the eleventh congressional district for reasons that, at most, are indirectly related to race. Henry County is overwhelmingly white. (Def. Jt. Ex. 21, p. 132)

As originally configured and as advocated by many of its black proponents, the eleventh congressional district would have gone through Rockdale and Newton Counties to connect DeKalb to the rest of the district in east central Georgia. That was changed for various political reasons, however. First, a white member of the House Reapportionment Committee, David Irwin, did not want his home county (Rockdale) split, and he was able to use

his influence to move the eleventh district lines to accomplish that. (Tr. II, p. 206-07) Second, Senate Reapportionment Chairman Eugene Walker was opposed to having Newton County in the district because that was the home of past fourth district congressman Ben Jones (who is white), and Walker saw Jones as a formidable potential candidate in the eleventh congressional district if Walker chose to run there. Walker ultimately did run for Congress in 1992 and, because the district went through Henry County instead of Rockdale and Newton Counties, Walker was spared Jones as a potential opponent. (Tr. II, p. 206)

Moreover, it is undisputed that the particulars of the congressional line in Henry County have nothing at all to do with any local racial considerations. (*Id.* at 207-09) The congressional line there was drawn largely along election precinct lines, and to the extent precincts were split, the line followed the already-drawn local House district boundary. The Henry County lines for the Georgia House reapportionment, in turn, were set by the local delegation from Henry County, reflecting their local political and community interests. Race was no factor in that. (Tr. II, pp. 207-09)

3. *Twiggs County.* Twiggs County was not split on account of any eleventh district considerations. It was split, instead, to accommodate the eighth congressional district. (Tr. I, pp. 128-29)

4. *Baldwin County.* Less than half of the Baldwin County population contained in the eleventh congressional district is black. (Pl. Ex. 25A) The congressional district line does extend to the western border of Baldwin County, but this line was drawn so as to follow the

existing county commission districts there. (Tr. I, pp. 125-26, pp. 209-210) Although the city limits of Milledgeville in Baldwin County are cut at one point, the Milledgeville appendage that was excluded gives the eleventh congressional district a more regular appearance because the city limits themselves are so irregular. (Pl. Ex. 15; Jt. Ex. 87)

5. *Chatham County*. Chatham County includes Savannah, Georgia, and it is one of the major urban areas in the State. Here again, while it is certainly true that portions of Chatham County were included in the eleventh district in order to allow black voters a better chance at electing persons of their choice, it is equally true that the line runs at least in part along boundaries that have wholly independent, non-racial meaning. For example, Bull Street and Victory Drive in Savannah are major arterials, and significant parts of the district line run along those streets. (Tr. II, pp. 215-16) Election precincts were largely kept intact in Chatham County. Only four out of thirty-four Chatham County precincts in the eleventh district were split. (Def. Jt. Ex. 21, pp. 127-128) Also, Garden City in Chatham County was kept intact, through the efforts of local representative Sonny Dixon, and significant numbers of blacks residing in Garden City were kept in the first congressional district as a result. (Tr. II, p. 218-19; P.I. Tr. pp. 56-58) This was done over the objection of some African-American members of the Georgia General Assembly. (Tr. IV, p. 103) Other portions of the congressional line in Chatham County are located along the Savannah City limits, railroad tracks, and other major visible boundaries in the County. (Tr. II, pp. 216-17) While plaintiffs proved that race was an overall consideration that brought the district into Chatham County, plaintiffs

failed to introduce any evidence concerning the extent to which these lines follow boundaries and physical features that have independent, non-racial significance.

6. *Effingham County*. Effingham County links Chatham County to the rest of the eleventh congressional district to the west and north. As with the rest of the district, it was drawn on the computer in Atlanta by combining election precincts and, where split, census blocks themselves. There was no instance in which a census block was split. (Tr. Vol. II, p. 253)

Plaintiffs complain of the narrow configuration of Effingham County, but they ignore *why* Effingham County was narrowed. It did not occur for any racial reason. To the contrary, the plan advocated by other members of the General Assembly and black members in particular would have taken approximately half of Effingham County. (Jt. App. 60) The plan adopted by the Senate before the second DOJ objection also contained a significantly wider portion of Effingham County. (Jt. App. 62; Tr. II, pp. 170-71) Effingham was narrowed to its present configuration entirely in response to the desires of the local member of the House of Representatives, Ann Purcell, who is white. (Tr. I, pp. 107-08; Tr. II, p. 213)

Plaintiffs' complaints, and the court's findings, about the sparsity of population in parts of Effingham and Chatham Counties are also misplaced. The State defendants introduced evidence that gives the relative population densities throughout all of Georgia, broken down by each of the eleven congressional districts. (Jt. App. 90-97; State Exs. 161-63) While the areas complained of in Effingham County and Chatham County do indeed have the lowest range of population – from zero to ten persons per

square mile – there are such areas elsewhere in the eleventh congressional district. (Jt. App. 90) Similarly, there are such areas "linking" other parts of other congressional districts. None of this evidence, which is undisputed, was addressed by the district court.

The sparsity of population in various areas throughout Georgia does not make the districts unconstitutional, and that is particularly so in the case of Effingham County where its relatively narrow configuration arose from non-racial political considerations.

7. *Richmond County*. Richmond County is the third major urban area that is partly included in the eleventh district. Augusta, Georgia is situated there. Here again, while Richmond County was indeed partly included in the eleventh in pursuit of the overall objective of creating a majority black district, the court made no findings addressing the evidence concerning the non-racial significance of the specific location of the district lines there. Neither did the plaintiffs introduce any evidence attempting to assess what part of the line was located on existing local features that had non-racial meaning, like highways, geographical boundaries, and the like.

By contrast, defendants proved, without contradiction, that significant portions of the Richmond County line are in fact situated on precinct lines, major roadways, municipal boundaries, etc. Moreover, while some of the precincts in Richmond County were originally split by the congressional district line (Tr. II, p. 224), those precincts were all easily modified so that not a single precinct remained split in the 1992 elections. (Def. Jt. Ex. 21, pp. 134-35) Of the 41 Richmond County precincts in the eleventh congressional district, the great majority of

voters reside in large precincts with over 1000 voters. (*Id.* pp. 134-135) The fact that precincts could be so easily constructed without being split by the congressional line is an indication that the Richmond County portion of the district followed meaningful local boundaries, as perceived by the local election officials who drew the precinct lines.

It should also be noted that the final Richmond County configuration is very similar to the way the county was configured in many other diverse proposals for congressional reapportionment that were introduced by members of the General Assembly from all over the State, white and black, Democrat and Republican. The final configuration of Richmond County also closely resembles the first plan enacted before any objection by the DOJ. (Jt. App. 51, 57)

8. *Wilkes County.* A relatively small area and few people are included from Wilkes County, but here, too, the line does to varying degrees follow portions of local precinct lines and roadways. And even here, the line was not drawn to "maximize" the number of blacks living in the eleventh district. It could have been drawn to do so, but that would have made it more irregular, and the State refused to do that. (Tr. II, pp. 219-20) Again, plaintiffs introduced no evidence to show what portion of the congressional line in Wilkes County was based only on race, if any, rather than on the county boundary itself or on other locally significant features. Neither did the court make any findings on that.

Georgia's first plan compared to the present plan. The plaintiffs and the district court make a great deal of the fact that Georgia's first two congressional enactments

were objected to under Section 5. Much is also made of the fact that the current plan, the third one enacted, was in some way "dictated" by the DOJ objections.

In fact, however, the final eleventh district is not so very different than it was initially. While the third metropolitan area included is now Savannah rather than Macon, the great bulk of the district is much the same. (Jt. App. 51, 57) The black population in the eleventh district in the first plan was 60.6 percent, compared to the present 64.1 percent. (Jt. App. 52, 58) Seventeen counties were included in the initial eleventh district, thirteen intact, four split.

There is no evidence that any member of the General Assembly considered this first plan unreasonable, "bizarre," a "racial gerrymander," or otherwise "offensive." To the contrary, the witnesses – including, for example, House Speaker Thomas Murphy – testified that the first plan was reasonable and satisfactory and was not a "racial gerrymander." (Tr. II, p. 81)

Another of the plaintiffs' witnesses, Sen. Wayne Garner, opined as to the final eleventh district that it "was a little bit distasteful to draw that long a district. . . . It is a little bit strange." (Tr. III, pp. 210-11) Plaintiffs' witness Rep. Sonny Dixon saw nothing wrong with the initial configuration of the eleventh district, but he believed redrawing the district to go to Savannah instead of Macon was the "straw that broke the camel's back." (P.I. Tr. 65-66) Mr. Dixon had a particular, personal interest in the Savannah portion since he hails from that area. (Tr. IV, p. 158)

The eleventh district lines in either the State's first or final plan compare very favorably, in terms of geometrical regularity, with a host of plans advocated as reasonable reapportionments by many members of the General Assembly, including blacks, whites, Democrats and Republicans. (*See, e.g.*, Def. Jt. Exs. 4, 8, 10, 11, 13, 15, 16, 17, 18 & 19; Jt. App. 60)

Race and politics: the likelihood of black candidates winning congressional seats. While the district court made generalized comments implying that African-American candidates often prevail in white majority districts in Georgia (J.S. App. 84), what the court is referring to there is unclear. This purported "finding" was not based on nor does it refer to any evidence.

Political reality is most apparent from the undisputed history of Georgia's congressional elections. The State's congressional delegation consists of three African-Americans, each elected from a majority black district (the second, fifth and eleventh). During the previous century, there has been only one instance in which an African-American candidate won a congressional seat in Georgia from a majority white district. That instance was Andrew Young who was elected to the fifth congressional district in Atlanta in 1972 when the district was just under 50 percent black. *In the 500 or so other congressional elections held in Georgia over the past century, no black candidate has ever won in a majority white district.*

The evidence reveals a similar stark reality if one looks at state legislative elections. Of 180 members in the Georgia House, there is one black member elected from a majority white district. (Jt. App. 26-27) In the 56-member

Senate, there are no African-Americans elected from majority white districts. (Jt. App. 27)

To the extent that Georgia's history of segregation is germane, it is well known and need not be repeated here. The district court issued a statement generally taking judicial notice of these facts. (Tr. V, p. 142-145) There can be no doubt that that history is related to some extent to the degree of segregation that exists as a matter of fact in Georgia politics today.

The evidence concerning standards for compactness in Georgia and elsewhere. Georgia is not a state like some where district "compactness" is preferred by any policy. No statute or constitutional provision dictates or prefers "regular" or "compact" districts. Neither was there any requirement of "compactness" or the like in either the House or Senate reapportionment guidelines. (Jt. App. 12, 65-77)

The relative unimportance of "geometric niceness" in Georgia's political boundaries is reflected in its current municipal boundary lines. Those lines, of course, are the only jurisdictional lines that have changed with any frequency in past decades. County lines do not change. In evidence are depictions of the largest cities in Georgia. (State Exs. 79-101) It is apparent from merely glancing at these that municipal boundaries in this State are far more irregular than the eleventh congressional district. *See, e.g.*, Jt. App. 84-89. The district court ignored this evidence and the extent to which it bore on the importance of "compactness" as a "traditional value" in the Georgia political process.

Political scientists testified for both plaintiffs and defendants as "experts" on the issue of compactness and

regularity. It is clear from their testimony that there is no such thing as a mathematical measure or definition of compactness that is of much value in the real world of reapportionment politics. While the plaintiffs' expert, a Dr. Ron Weber, did testify that there were objective "compactness scores," he admitted on cross examination that the very authors whose work he was reporting held the view that their measures provide "no bright line" of any sort for measuring compactness. Indeed, the original authors of the various measures – and there is no limit to the number of mathematical formulas and scores one can concoct – express concern whether the measures say anything useful at all. (Tr. IV, pp. 278-279; 281, 283, 285, 287-88) Interestingly, Dr. Weber's testimony in this case that there was a "bright line" cutoff for compactness contradicted his own testimony from a month before in the Texas reapportionment case. There, Dr. Weber testified to compactness cutoff levels that were *satisfied* by the compactness scores for the eleventh congressional district. (*Id.* pp. 275-77)

Although the district court's view of these compactness measures is not entirely clear, it is apparent that the court found none of the available measures to be particularly helpful or persuasive, and certainly none provided a "bright line benchmark."

> Unfortunately, there is no litmus test for compactness; it has been described as "such a hazy and ill-defined concept that it seems impossible to apply it in any rigorous sense in matters of law." (Tr. Vol. IV, p. 282) . . . Various mathematical based measures have been created, none of which yielded clear answers in this litigation. . . . (J.S. App. 78-79)

SUMMARY OF THE ARGUMENT

Appellants contend that the district court erred in several fundamental ways. First, the majority read *Shaw* and this Court's other voting decisions incorrectly. The majority interpreted *Shaw* to invalidate a district as unconstitutional if there was a significant racial *purpose* behind the drawing of the district, regardless of whether the district as a whole was extremely irregular or bizarre. The court held that "bizarreness" was not an essential element of a plaintiff's claim in a *Shaw* case. According to the majority, shape is relevant only as an item of circumstantial evidence that may bear on the only legally relevant issue, that being whether there is a significant racial purpose. Appellants contend that this interpretation of *Shaw* is incorrect, and that a *Shaw* claim cannot be made out unless plaintiffs first establish that a district is extremely irregular. Circuit Judge Edmondson agreed with Georgia's reading of *Shaw* in his dissent.

Secondly, appellants contend that *Shaw* should be applied narrowly so as to reach only the most extremely irregular, irrational districts. Otherwise, the judiciary would be forced to pass judgment on political and policy matters that lie at the core of the legislative process. Inevitably, if *Shaw* were given an expansive interpretation, the decisions of courts would be perceived as having their own political overtones, the opinions and values of judges supplanting those of legislators. Appellants contend that narrow, objective standards should be adopted that will produce *predictable* results in *Shaw* litigation. In the present case specifically, Georgia contends that the

Shaw threshold of bizarreness was not met because the district was comprised predominantly of traditional units of government and the great majority of the district line itself runs along state, county and city boundaries.

Finally, Georgia also contends that, if a more extensive analysis is proper under *Shaw*, the eleventh district should still pass muster. While it is undisputedly true that the eleventh district was purposely drawn as a majority-minority district, the line itself was then made as regular as possible. For the relatively small portion of the district line that does not lie exactly along a county boundary, it is predominantly based on other geographical and political markers that have local significance independent of race. None of this evidence was addressed by the district court, presumably because it was irrelevant to the majority given their holding that the purposeful creation of a majority-minority district was itself unconstitutional. To the extent that race-conscious districting might be permitted at all under the district court's ruling, the court held that that could occur only in the "occasional" adjustment of some lines. Since the evidence is undisputed that the eleventh congressional district was intentionally drawn as a majority African-American district, the court held that it was unconstitutional on account of this illicit purpose. Appellants contend that the district court erred in holding race conscious districting so universally unconstitutional.

ARGUMENT

I. THE TRIAL COURT ERRED IN INTERPRETING *SHAW* TO PERMIT INVALIDATING A REAPPORTIONMENT PLAN REGARDLESS OF WHAT ITS SHAPE MAY BE AND REGARDLESS OF WHETHER THE DISTRICT LINE GENERALLY IS EXPLAINABLE ON GROUNDS OTHER THAN RACE.

The two judges on the trial court who voted to invalidate Georgia's eleventh district incorrectly held that the configuration of the district itself was not an element of the plaintiffs' claim. Instead, the majority interpreted *Shaw's* discussion of "bizarreness" and "irregularity" to be directed solely to an evidentiary inquiry into the motivations of the legislature.

> The shape of the district is *not* a "threshold" inquiry preceding an exploration of the motives of the legislature. That is, the court does not assess, on first principles, whether the district looks "bizarre," and then, if it does, proceed to an Equal Protection analysis. (J.S. App. 30)
>
> The purpose of scrutinizing a district's shape is to glean the intent of the legislature by working backwards. . . . (J.S. App. 42)
>
> What the Supreme Court did not do is imbue geography with constitutional significance. (J.S. App. 42)

Appellants submit that this reading of *Shaw* is incorrect. In truth, the highly irregular, bizarre character of a district is an essential element of a *Shaw* claim. Without it, not even a prima facie equal protection claim can be made out. Judge Edmondson so read *Shaw* in his dissent:

> The words "on its face" in *Shaw* were not used lightly, I believe. The district's shape is no mere piece of evidence; it is a critical part of the cause of action. (J.S. App. 96-97)

That "bizarreness" is an essential element of a *Shaw* claim seems apparent from this Court's opinion. Over and over, the opinion states that a district may be challenged on *Shaw* grounds where it is "bizarre," "highly irregular," "irrational on its face," and the like. 125 L.Ed.2d at 520, 525-30, 532, 536. This Court summed up its holding in *Shaw* this way:

> Today we hold only that appellants have stated a claim under the Equal Protection Clause by alleging that the North Carolina General Assembly adopted a reapportionment scheme so irrational on its face that it can be understood only as an effort to segregate voters into separate voting districts because of their race, and that the separation lacks a sufficient justification. *Id.* at 536.

A "bizarre," "extremely irregular" configuration is not a mere item of circumstantial evidence. It is a critical element of the cause of action itself.

As noted in appellants' statement of facts, *supra* at 8-9, they presented a wealth of evidence establishing that the eleventh district in Georgia largely followed the most traditional of all possible boundaries – state lines, county lines, and city limits. In addition, where the eleventh deviated from those boundaries, which was unavoidable, it followed other geographical markers of local significance. *Supra* at 9-17. The district court literally ignored all of this evidence because, under its analysis, the exact

shape of the district was not an essential element of the plaintiffs' claim. Once the court found that race was a significant factor that influenced the overall shape of the district – a fact that was never in dispute – the court's inquiry was effectively over. That finding was sufficient, under the majority's reasoning, to require "strict scrutiny." (J.S. App. 30-31, 36-40)

Correctly reading *Shaw* to require proof of shape "bizarreness" as an essential element of the plaintiffs' claim, Judge Edmondson's dissent concluded that the plaintiffs' case failed at this threshold:

> In determining whether this district is bizarre, the court may consider many factors, including the district's size, outline, allegiance to traditional districting principles such as compactness and respect for political subdivisions, and how it appears in comparison to other districts in the State's plan, earlier plans, or even districts from other states. Based on objective criteria, I cannot find and cannot conclude that plaintiffs have proved the Eleventh District is bizarre or highly irregular within the meaning of *Shaw*. (J.S. App. 97)

II. THE DISTRICT COURT ERRED IN HOLDING THAT THE EQUAL PROTECTION CLAUSE IS VIOLATED SIMPLY BECAUSE A STATE INTENTIONALLY CONSTRUCTS A MAJORITY-MINORITY DISTRICT FOR THE PURPOSE OF AFFORDING MINORITY CANDIDATES REASONABLE OPPORTUNITIES TO BE ELECTED.

A. Because the Trial Court Incorrectly Focused Just on the Overall Racial Objective of the Eleventh District, the Court Failed to Make Proper Findings Regarding the Actual Contours and Configuration of the Eleventh District.

The majority opinion focuses its criticisms largely on ideas, proposed plans, and statements of legislators and others that pertain to proposals that were never enacted. The bulk of the discussion of reapportionment consists of a sound thrashing of the ACLU, the Department of Justice, and one black legislator and his attorney. The court's criticisms of these institutions and individuals – starting with the *unenacted* "max-black plan" – take up the entire part of the opinion under the category of "Facts." (J.S. App. 5-28)

Georgia does not come before this Court to justify or excuse the conduct criticized by the trial court. But the State does take issue with the court's focus on a proposed plan that was not enacted. Such unenacted proposals are of little consequence here, even if they would have violated *Shaw* if enacted. It is similarly of little or no consequence that a single legislator, in advocating his own (unenacted) plan, disavowed any personal concern for the reasonableness of legislative lines. (J.S. App. 7-9)

Finally, this case is not about the alleged wrongdoing of the Department of Justice under Section 5. The DOJ is not on trial here. Georgia's reapportionment plan is, and the fact that some part of that plan may have been adopted in response to a DOJ objection says nothing about the constitutionality of the plan. What would otherwise be unconstitutional surely is not made constitutional just because it might have been enacted in response to a DOJ objection. Conversely, the constitutionality of a state plan does not turn on whether some part of it was adopted after a DOJ objection and based upon the General Assembly's judgment that, on balance, it was preferable to change the plan than file a preclearance action in the District Court for the District of Columbia.[1] (J.S. App. 93 n. 1)

Judge Edmondson's dissent makes this same point. The eleventh district cannot be condemned because of the ACLU's "max-black" plan since that plan was not enacted and since the eleventh district that was enacted is far more regular than that proposal:

> One plan was (and is) known as the "Max-Black" plan or the "Max Plan". The proposal was drawn with one idea in mind: to maximize

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[1] The State of Georgia has shown no reluctance to pursue preclearance litigation in the District of Columbia where doing so seemed appropriate. As recently as February 3, 1995, the State successfully obtained a declaratory judgment action concerning the addition of superior court judgeships. *State of Georgia v. Reno*, Civil Action No. 90-2065 SSH, KLH, NHJ (D.D.C. 1995).

> black representation in Congress and as a corollary to boost black voting power in certain districts in Georgia. The plan shows what the Eleventh District would look like if it was wholly based on race. The Max-Black plan did influence to some degree the shape of the ultimate Eleventh District, a majority black district. But, it seems important to me that the actual Eleventh is *not* identical to the Max-Black plan. The Eleventh, to my eye, is significantly different in shape in many ways. These differences show, as I understand it, consideration of other matters beyond race, including traditional districting factors (such as keeping political subdivisions intact) and the usual political process of compromise and trades for a variety of nonracial reasons. *In the light of Shaw,* the Max-Black proposal for what became the Eleventh District would likely have been bizarre in shape, but the actual Eleventh District is much more regular. (J.S. App. 99, n. 5) (emphasis added)

B. The Trial Court Incorrectly Concluded that a Significant Racial Purpose Alone Rendered the District Unconstitutional.

Even the majority opinion makes it clear that there are profound differences between the enactments of the General Assembly and the ACLU or DOJ "max-black plan."

> The General Assembly leadership was concerned with passing redistricting legislation affecting all Georgians, and contended with numerous factors, racial, political, economic, and personal. As the law making body for the entire State, the General Assembly could *not*

> afford such a narrow focus. *Consequently, its submissions reflected many influences, and the ACLU's reflected only race.* (J.S. App. 26) (emphasis added)

Notwithstanding this explicit recognition that the State's enactments were, in fact, reflective of a broad range of considerations, the court nevertheless focused its fact finding on the ACLU and DOJ conduct, or misconduct.

The majority opinion is misfocused because of the rule of law it adopts, which holds that racial purpose is the controlling issue. Applying that rule in this case, the demise of the eleventh district was all but inevitable. It is undisputed that Georgia's eleventh is the product of a desire by the General Assembly to create a majority black district in east central Georgia. This legislative consensus – *and there is no evidence that a single legislator ever disagreed with it* – preexisted any DOJ objection; it was not forced on the State by the ACLU; and it was the product of all 236 Georgia legislators, not the political agenda or proclamations of any one.

It is this very objective – that of creating, purposely and consciously, a majority black district – that was condemned by the district court.

> The proper interpretation of *Shaw v. Reno's* "race-based" requirement is that, in order to invoke strict scrutiny, it must be shown that race was the *substantial or motivating consideration.* That term requires that the legislature (a) was consciously influenced by race and (b) while other redistricting considerations may also have consciously influenced the district's shape, race was *the overriding predominant force* determining the lines of the district. (J.S. App. 36)

Because the eleventh district had an admitted *ab initio* objective of black majoritarianism, the court's proscription of racial motivations led directly to a judgment of unconstitutionality.

The purposeful inclusion of blacks was unconstitutional, plain and simple. Indeed, the court found the "most notable" proof of invidious racial purpose to be the simple fact that the district's black population was significantly higher percentage-wise than the State's as a whole.

> Other observations shed light on the racial manipulation behind the Eleventh, most notably the simple one that the total black population of Georgia is 26.96%, while within the Eleventh, it is 64.07%. (J.S. App. 48)

The individual county splits were criticized because the portions included in the eleventh district were blacker than the portions located in other districts. For example, the court criticizes the fact that Dekalb County as a whole is 42.2 percent black, but the portion of the county contained in the eleventh district is blacker than that, 74.6 percent. (J.S. App. 47) Similarly, the court criticizes the fact that while Richmond County as a whole is 42 percent black, the part inside the eleventh district is 66 percent black. (J.S. App. 46) The same is said of Chatham County. (J.S. App. 44)

While the court held that it was unconstitutional to include particular counties or parts of counties in a district in order to achieve a black majority, the court purported to leave minor "tinkering" room for a State to make slight modifications to a plan based upon race. Yet

this privilege is a very narrow one, allowing the State merely to "alter the occasional line in keeping with that consideration [race] – without incurring constitutional review." (J.S. App. 39) Where race plays any more meaningful role than that, strict scrutiny is triggered.

The district court's rejection of race-conscious districting peaked in its condemnation of any plan, including the present one, that purposely sought to provide minorities with a reasonable chance at roughly proportional representation. That objective itself was held to be unconstitutional.

> To erect the goal of proportional representation is to erect an implicit quota for black voters. Far from a compelling State interest, such an effort is unconstitutional. (J.S. App. 54)

Later in the opinion, the majority goes on to "denounce[] the cause of proportional representation." (J.S. App. 72)

> The potential harm of a proportional representation benchmark is not easily overestimated. Such a standard dictates racial quotas for our democratic institutions based on the percentage of each race and the population at large. . . . [T]heir conscious construction as entitlements for each racial group causes the societal damage against which we warn today. If efforts to *require* proportional representation of minorities in democratic institutions are not stopped with clarity and force, they will divide this country into a patchwork of racial provinces, and ensure that elected officials represent races before they represent citizens. The VRA neither intends nor requires the devolution of voting rights into

> racial bargaining chips to be bickered over by special interests, and we will not support that cause. (J.S. App. 71) (citation omitted)

The district court's criticism of race conscious districting incorrectly reads *Shaw*. While the district court correctly held that "[p]roportional representation simply is not a constitutional requirement" and is not a "statutory requirement" (J.S. App. 54), the court erred when it went much further and held that a legislature acts unconstitutionally if it pursues proportionality as a policy objective. *Shaw* expressly declined to endorse what the district court here advocates:

> It is unnecessary for us to decide whether or how a reapportionment plan that, on its face, could be explained in non-racial terms successfully could be challenged. Thus, we express no view as to whether "the intentional creation of majority-minority districts, without more" always give rise to an equal protection claim. 125 L.Ed.2d at 530.

Further commenting on this issue, Justice O'Connor's opinion in *Shaw* states:

> [A]ppellants appear to concede that race-conscious redistricting is not always unconstitutional. That concession is wise: This Court never has held that race-conscious state decision making is impermissible in *all* circumstances. *Id.* at 525 (citation omitted).

The district court's rejection of all benign race-conscious redistricting also runs afoul of the Court's recent decisions in *Voinovich v. Quilter*, 122 L.Ed.2d 500 (1993), and *Johnson v. DeGrandy*, 62 U.S.L.W. 4755 (1994). In

Voinovich, this Court unanimously upheld Ohio's intentional, race-based drawing of state legislative districts designed to create majority-minority seats. Similarly, in *DeGrandy*, the Florida legislature had taken race into account in order to create effective proportionality for black and hispanic people. Those legislative efforts, too, were upheld.

The district court's reliance on cases outside the voting area for its view that race-motivated districting is unconstitutional is misplaced. The court cites *Washington v. Davis*, 426 U.S. 229 (1976), *Mobile v. Bolden*, 446 U.S. 55 (1980), *Rogers v. Lodge*, 458 U.S. 613 (1982), and *Arlington Heights v. Metropolitan Housing*, 429 U.S. 252 (1977). Those cases dealt with a very different kind of issue. The question in each was whether a completely neutral and facially reasonable policy was unconstitutional where the challenged practice significantly disadvantaged the plaintiff minority. This Court held that such neutral policies that adversely impacted a racial minority must also be shown to be motivated by a discriminatory purpose.

In the present case, by comparison, there is no suggestion or evidence that white voters are adversely impacted or that their votes are in any way diluted by Georgia's congressional reapportionment plan. As discussed in *Shaw*, the issue in cases like the present one is unique, and it is this: When is "redistricting legislation . . . so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting"? 125 L.Ed.2d at 525.

It should be no surprise that the *Shaw* test differs from that which may be applicable in certain other, but

very different equal protection cases. The plaintiffs' claim here is that the State acted unconstitutionally in its effort to use race "benignly" for the purpose of affording minorities reasonable representation where they would not likely achieve it otherwise. This one feature of *Shaw* cases make them somewhat like the affirmative action cases. *See, e.g., Adarand Constructors, Inc. v. Pena*, Case No. 93-1841 (U.S. argued Jan. 17, 1995); *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990); *City of Richmond v. J.A. Croson Company*, 488 U.S. 469 (1989); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). Aside from the benign racial motivation that exists in both situations, however, *Shaw* challenges present very different issues. The differences include the important fact that there is no "innocent victim" in *Shaw* cases, unlike the usual affirmative action case. There is no white vote dilution. Secondly, the racial classifications in the affirmative action cases are explicit. Such policies have always been more susceptible to challenge, whether benign or invidious.

And finally, reapportionment is by its nature completely different than the kinds of issues presented in these employment, contracting, licensing, and school admissions cases. In each of those cases, the principal function of the government at issue had nothing at all to do with race. Race was simply injected through an affirmative action plan in order to remedy what was believed to be past discrimination.

Reapportionment is inherently different. Its very purpose is to distribute political power among the population, to empower people and to allow them to elect

representatives of their choice. Inherent in reapportionment is the decision of how to distribute that power and who gets it. The question of race cannot be avoided. Given the political realities that persist today, *see supra* at 19-20, Georgia's General Assembly initially faced a stark policy question. Would minority representatives be included or not? To have eleven approximately homogeneous districts that matched the State's overall population – as the district court insinuates would be appropriate (J.S. App. 48) – would virtually guarantee the exclusion of African-Americans from Georgia's delegation. Never before in the history of the State has any black candidate been elected from a congressional district that was anywhere close to 27 percent black (the statewide percentage). Surely the General Assembly was entitled to assume, as a simple empirical matter, that this compelling historical pattern was likely to continue in the immediate future.

Given this present day reality, the General Assembly *had* to make a choice when it came to how African-American voters and candidates would be treated. Would blacks be included or excluded? The racial percentages of the districts was the critical ingredient in making that choice. To consider race in reapportionment is not to consider some extraneous factor, nor is it to add onto some other governmental function a separate and unrelated social purpose of trying to remedy past societal or governmental discrimination. Rather, race may be considered, and was considered here, simply to be sure that the resulting distribution of political power was reasonably fair and representative of the State's people.

The implications of the rule of law announced by the district court are extreme. To hold that election practices cannot be adopted for the purpose of giving minorities "fair," "proportional," or "full" opportunities to participate in the political process – which is what the district court holds when it says district lines cannot be located because of race – would lead to non-sensical results. For example, if the State of Georgia were to opt in a particular county to use a district election system rather than an at-large system, *in order to* give minorities a fair shot at representation, that would be unconstitutional because it was motivated by racial considerations, albeit benign. And would not this Court's acknowledged preference for single-member districting in court-ordered plans be suspect precisely because, as Justice Scalia explained, assisting "minority-voter participation" is "why [the Court has] strongly preferred single-member districts for federal court-ordered reapportionment." *Growe v. Emison*, 122 L.Ed.2d 388, 404 (1993).

As these examples illustrate, the district court has strayed far from the true state of the law in holding that an election practice is subject to strict scrutiny just because it was adopted in order to enhance "minority-voter participation in the political process." *Id.*

III. IT IS CRITICAL THAT OBJECTIVE CRITERIA BE USED IN APPLYING *SHAW*, AND WHEN SUCH CRITERIA ARE USED, GEORGIA'S ELEVENTH DISTRICT PASSES CONSTITUTIONAL MUSTER.

A. Objective Criteria Need to be Used in *Shaw* Cases in Order to Minimize Judicial Involvement in the Most Intricate Political and Policy Judgments of State Legislatures.

There is a compelling need for objective criteria in this complex area of law and politics. Justice Frankfurter could not have imagined the chaos that now threatens in reapportionment cases when he warned against entering the "political thicket" a half century ago. *Colgrove v. Green*, 328 U.S. 549, 555 (1946) (Frankfurter, J., concurring). If the courts are to avoid ever-deeper forays into that thicket, then simple, objective criteria for determining "irregularity" under *Shaw* must be adopted.

If *Shaw* meant more than this and if it bestows on federal courts more expansive authority to review state-enacted reapportionments, then *Shaw* would arrogate to the courts the classic role of "super-legislature" that our Constitution forbids. *See, e.g., City of Mobile v. Bolden*, 446 U.S. 55, 76 (1980); *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965); *Burns Baking Co. v. Bryan*, 264 U.S. 504, 534 (1924) (Brandeis, J., dissenting). It is in precisely this core area of political judgments that touch directly on the ballot that courts should be most reluctant to tread. The ballot is the ultimate democratic expression in our elected system of government, and it should be tampered with by the courts only in the clearest and most compelling of cases.

Defendants believe that this view is underscored by the Court's recent decision in *Holder v. Hall*, 62 U.S.L.W. 4728 (1994), which held that Georgia's single commissioner governments were immune from Section 2 challenge. Justice Kennedy's plurality opinion is especially pertinent here. It reasoned that a Section 2 claim could not be mounted because there was no meaningful, justiciable standard by which vote dilution could be measured. Here, too, the absence of a justiciable standard should give pause before allowing free-wheeling claims of voting discrimination by white voters. As Justice Kennedy wrote in *Holder*:

> [W]here there is no objective and workable standard for choosing a reasonable benchmark by which to evaluate a challenged voting practice, it follows that the voting practice cannot be challenged as dilutive under § 2.
>
> As the facts of this case well illustrate, the search for a benchmark is quite problematic when a § 2 dilution challenge is brought to the size of a government body. There is no principled reason why one size should be picked over another as the benchmark for comparison. *Id.* at 4730.

Holder underscores the fundamental problem here. While *Shaw* opens the door to constitutional challenges to irregular districts, such challenges should prevail only in the most extreme circumstances, judged by a set of objective standards that can be predictably applied. Otherwise, the courts will be making political judgments that belong elsewhere. The problem is already evident. The results of *Shaw* challenges are extremely inconsistent, with a very spindly plan upheld in one case, *Shaw v. Hunt*, 861

F.Supp. 408 (E.D.N.C. 1994), and Georgia's more reasonable appearing plan struck down here. In Texas, the same court struck majority-minority districts that appear little different than majority white districts that were upheld. *Vera v. Richards*, 861 F.Supp. 1304 (S.D. Tex. 1994). Public confidence in the courts necessarily suffers with *Shaw* being applied so subjectively. It is too easy to assume that the political predilections of judges affect the outcome of cases, and this unwholesome quandary will persist unless this Court brings to *Shaw* clear and predictable criteria.

The problem with a loose interpretation of *Shaw* is apparent from the two opinions in the present case. The majority clearly has its own view of what a congressional redistricting plan should look like in Georgia.

> Why split 26 counties at all? With the exception of Texas, Georgia has more counties than any other state in the Union; one would think that such proliferation would provide ample building blocks for acceptable voting districts without chopping any of those blocks in half. . . . And why excise Savannah – and just portions of Savannah – from its traditional economic place in the "coastal" region of Georgia? The eleventh district could have been easily revised to include one or more whole counties while still meeting the one person/one vote requirement, and other traditional districting concerns would have been better served. (J.S. App. 48)

The dissent, on the other hand, has other views of what might be reasonable. But more fundamentally, Judge Edmondson shows restraint as to when a federal

judge should supplant the action of the General Assembly with his or her own views:

> Federal courts must be on guard against the temptation to venture into the realm of political science. And not every district that some expert or some federal judge could draw "better," that is, more regularly or more compactly, is "highly irregular" within the meaning of *Shaw*. Whatever I may personally think about the wisdom of the Eleventh's boundaries or of the policy choices that led to them, the Eleventh District is not so bizarre on its face to justify, pursuant to the Constitution, a more searching inquiry. (J.S. App. 101)

Judge Edmondson's view reflects this Court's historic reluctance to enter the political arena and substitute judicial judgment for a complex political one:

> Reapportionment of a state's congressional districts is fundamentally the domain of the states rather than the federal courts. *Growe v. Emison*, 113 S.Ct. 1075, 1080 (1993); *Connor v. Finch*, 97 S.Ct. 1828, 1833 (1977); *Reynolds v. Sims*, 84 S.Ct. 1367, 1394 (1964). The Constitution leaves the responsibility for apportioning congressional districts with the states. *Id.*; *Voinovich v. Quilter*, 113 S.Ct. 1149, 1157 (1993). And, state political considerations pervade the apportionment process making it a "highly complex and multifaceted . . . political thicket." *Reynolds*, 84 S.Ct. at 1385. . . . The evidence – such as the Lieutenant Governor's testimony – in this case shows that apportionment legislation takes this process to an especially intense level.
>
> Largely because of the uniquely political, sensitive, and complex nature of apportionment, a

> federal court hearing a challenge to a state's apportionment plan must give federalism concerns especially significant consideration. The Supreme Court has repeatedly stressed that "[f]ederal courts are barred from intervening in state apportionment in the absence of a violation of federal law precisely because it is the domain of the states, and not the federal courts, to conduct apportionment in the first place." *Voinovich*, 113 S.Ct. at 1157. Federal courts are bound to respect a state's apportionment decisions unless the choices have clearly violated constitutional or federal law requirements. *Id.* (J.S. App. 92-93) (footnote omitted)

An unparalleled political thicket will afflict the courts if *Shaw* is not restrained by objective standards.

B. Applying Simple Objective and Traditional Redistricting Criteria to Georgia's Plan, Plaintiffs Fail to Meet the Threshold Test of *Shaw* Irregularity.

Throughout this case, the State of Georgia has advocated that *Shaw* should be satisfied at the outset where a district is for the most part composed of wholly traditional political building blocks and the overall district line runs along such boundaries. Georgia continues to contend that such objective factors, where satisfied, provide a straightforward way of determining whether a reapportionment plan is so irregular that it might be challenged under *Shaw*.

Judge Edmondson agreed in his dissent that such objective factors should have insulated Georgia's eleventh district from strict scrutiny. The factors he focused on are (1) the relative size of the district, (2) the length of

its borders, (3) the fact that the district was largely contiguous with state, county and municipal boundaries and (4) the fact that the great bulk of the district's area came from intact counties. (J.S. App. 97-98)

While Georgia has never denied that the eleventh district was conceived and designed from the beginning as a majority-minority district, the evidence establishes much more than that. Beyond this general racial objective, the State made intensive, concerted efforts to make the district line as regular as possible and to respect nonracial redistricting considerations to the greatest extent feasible. That fact is undisputed. *See supra* at 8-17.

As a result of these efforts, the eleventh is based primarily on the most traditional of all districting principles. The great bulk of the district consists of whole, intact counties (86.6 percent). Of the entire district boundary line, an extraordinarily high 71.1 percent runs right along existing state, county or municipal boundaries. It is these objective facts on which the plaintiffs' claim should founder. As Judge Edmondson reasoned in dissent:

> 1. The size of the district is not particularly noteworthy. Georgia's Districts One, Two, and Eight each have a total area of over 10,100 square miles. In contrast, the Eleventh District has an area of 6,780 square miles.
>
> 2. The district's 1,184 miles of borders is not distinctive when compared to the Second (1243 miles) or the Eighth (1155 miles) Districts.
>
> 3. Plaintiffs claim that the district is bizarre because it comes within 58 miles of crossing the entire State. But, the Ninth District spans the entire northern border of the State and the First,

> Second and Eighth Districts begin at the Florida border and stretch north to almost the middle of the State. . . .
>
> 7. That the Eleventh District splits eight counties is unremarkable. The Sixth District has no whole counties but part of five counties. And, the Fourth District has one whole county and parts of two others. Splitting counties in Georgia's congressional districts for reasons wholly unrelated to race is part of Georgia's history: for example, Whitfield in 1970 and Gwinnett in 1980. (J.S. App. 97-100) (footnote omitted)

In sum, Judge Edmondson then concludes, as a matter of law:

> Based on objective criteria, I cannot find and cannot conclude that plaintiffs have proved the Eleventh District is bizarre or highly irregular within the meaning of *Shaw*. (J.S. App. 97)

Appellants believe that this predominantly traditional character of the eleventh should be determinative under *Shaw*.[2] To apply *Shaw* in this way would provide an objective standard and a manageable threshold, and it would maintain in full the essential principle of *Shaw*. If *Shaw* were applied more expansively, the courts would be drawn into a microscopic analysis of each and every part of the district line. Doing so would not advance the policy rationale of *Shaw*, and it would require the kind of invasion by the judiciary into politics and reapportionment that all agree is undesirable.

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[2] By comparison, the district challenged in *Shaw* involved parts of ten North Carolina counties. Not a single county was kept intact. (J.S. App. 107)

IV. EVEN IF *SHAW* WERE APPLIED SO AS TO REQUIRE MORE INTENSIVE SCRUTINY OF A DISTRICT LINE, THE ELEVENTH DISTRICT WOULD PASS MUSTER BECAUSE THE LINE HERE RUNS ALONG BOUNDARIES THAT HAVE MEANING WHOLLY INDEPENDENT OF RACE.

A. The Eleventh District Line is Situated Throughout on Boundaries and Physical Features that have Significant Non-Racial Meaning.

If a more detailed assessment were appropriate for the remaining 28.9 percent of the entire district line that is not contiguous with another Georgia political unit, it is clear from the undisputed evidence that the eleventh would still pass muster. How the line is configured in each of the eight split counties has been reviewed above. *See supra* at 9-17. The undisputed evidence establishes that the district line is predominantly located on geographical and political markers that have local significance wholly independent of race. The line follows such things as major highways, State House district lines, local county commission district lines, railroad tracks, major urban thoroughfares, and local election precincts. Judge Edmondson notes this fact in his dissent where he writes that, where the eleventh appears to make "curious turns in some areas," in fact "in these areas most of the lines follow existing city boundaries or major highways and roads." (J.S. App. 98)

The majority opinion ignored this evidence, the only reference being one passing comment concerning how

election precinct lines were used.[3] One of Georgia's reapportionment guidelines dictated that election precincts be used as district building blocks where reasonably practicable. Precinct lines in Georgia are determined by local authorities and, by law and by fact, they must be based upon known, recognizable physical features. (Tr. II, p. 125-28) *There is no evidence in this case that any of these lines were based on race.* Necessarily, a congressional district line following such precinct lines is based to a meaningful degree on locally dictated considerations that have meaning independent of race. The majority's opinion brushes this evidence off. While the court acknowledges that the "splitting of precinct lines [was] generally avoided where possible" (J.S. App. 47), the court dismisses this fact out of hand as irrelevant because the overall purpose in designing the district was to create a majority black one:

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[3] The majority has a brief section on "compactness," but it makes no effort to review the detailed evidence on precisely where the eleventh district line is situated. (J.S. App. 77-82) Moreover, "compactness" is discussed there only for the purpose of determining whether Section 2 might compel a majority-minority district so as to satisfy strict scrutiny. Georgia submits that "compactness" under the Section 2 standard in *Gingles* is a very different concept than "bizarreness" in *Shaw*. The mere fact that a proposed district may not be "compact" enough to be forced on a state in Section 2 litigation, surely does not mean that it is so irregular as to be bizarre under *Shaw*. If this were not the case, and there wasn't some meaningful latitude between "bizarre" and "non-compact," the State's reapportionment discretion would be far too confined by federal mandate. States would be left no discretion between districts compelled by Section 2 and those prohibited by *Shaw*, and that should not be how the Constitution and Section 2 fit together.

> Yes, the precinct lines provide a non-racial explanation for a district boundary, but, as Ms. Meggers stated, she was "just lucky"; the overriding reason for cutting through the area in the first place was to scoop up black voters. . . . The fact that Ms. Meggers minimized the damage does not undermine that central motivation. (J.S. App. 47)

The district court's review of this evidence is wrong as a matter of fact and as a matter of law. As a matter of fact, it ignores and contradicts the evidence that large, predominantly white precincts were included in the eleventh in order to make the district line more regular. *See, e.g., supra* at 12. As a matter of law, the court erred by focusing solely on the overall racial purpose behind the district, and ignoring whether the line is in fact situated in locations that have significance independent of race. The court's focus on the general overall motive – and not the actual results, shape and line location – does not comport with *Shaw*.

No other mention is made by the majority of any of the extensive evidence concerning how and where the line is located where it deviates from county boundaries.

B. The Evidence Concerning Compactness and the Regularity of Political Boundaries in Georgia Confirms That the Present District Should Pass Constitutional Muster.

While appellants believe that the Court's *Shaw* inquiry should be satisfied by the foregoing factors, the

remaining evidence also supports the view that the district line here is reasonable in the context of what occurs in Georgia. First, it is important to underscore the fact that, unlike some states, Georgia has no statutory or constitutional requirement or preference for "compact" or "regular" political line drawing.[4] The reapportionment guidelines adopted by Georgia's House and Senate similarly lack any such preference.

Next, as noted in Judge Edmondson's dissent, Georgia hardly has a "tradition of . . . neat, geometric shapes." (J.S. App. 98-99) Prior to this Court's decision in *Wesberry v. Sanders*, 376 U.S. 1 (1964), the congressional districts were grossly malapportioned and they say relatively little about what may be appropriate in the modern one-person, one-vote era. In the post-*Wesberry* reapportionments following the 1970 and 1980 censuses, congressional reapportionment in Georgia was both times tainted by affirmative racial discrimination. *See* generally *Busbee v. Smith*, 549 F.Supp. 494, 499-500 (D.D.C. 1982), aff'd, 459 U.S. 1166 (1983).

The most frequently drawn political boundaries in Georgia today are municipal ones. Cities change and grow from time to time independent of the taking of a census. Defendants introduced maps of Georgia's largest municipalities, and a sample of these is contained in the Joint Appendix. *See* pp. 84-89. This evidence was ignored by the district court even though it speaks directly to what constitutes a reasonable, regular and traditional

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[4] For many years, Congress mandated that congressional districts be compact. The requirement has been omitted since 1929. *Wood v. Broom*, 287 U.S. 1 (1932).

political boundary in Georgia. Virtually without exception, these shapes are far more contorted and irregular than that of the eleventh congressional district.

The testimony of legislators offered by plaintiffs also cuts against their position. It is undisputed that the General Assembly as a whole found the initial plan enacted to be reasonable. It was not perceived as a "racial gerrymander." *See supra* at 18. *There is, in fact, no evidence that any legislator or reapportionment staffer ever believed the initial plan to be offensive as a racial gerrymander.*

Although this fact is never mentioned in the majority opinion, it should be extremely problematic for the plaintiffs because the final plan that was enacted is fundamentally like the initial plan. The split portions of Dekalb and Richmond Counties, for example, are essentially the same. The only significant difference is that one urban area that forms a part of the eleventh in the final plan comes from Savannah, as opposed to Macon in the first plan. (Jt. App. 51, 57)

No one could seriously suggest that there is such a difference between the first and final plans that some articulable constitutional barrier was crossed as the State went from one to the other. But given the undisputed consensus of all of the legislators involved – both white and black, Republican and Democrat – that the first plan was reasonable, that is precisely the impossible burden the plaintiffs face. Under this evidence, it would be especially dubious for a court to supplant its judgment of what might be reasonable.

CONCLUSION

For the foregoing reasons, appellants respectfully request that the judgment of the district court be reversed and that the case be remanded with instructions that the complaint be dismissed.

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TABLE 1
The Area of Georgia Congressional Districts
And Portions in Entire Counties

[Area in square miles]

Cong. Dist.	Total Area	Area Within Intact Cnties	Area Within Split Cnties	Percent Within Intact Counties
1	10,425	9,608	817	92.2%
2	10,125	8,479	1,646	83.7%
3	3,829	2,426	1,402	63.4%
4	443	131	312	29.5%
5	406	0	406	0.0%
6	586	0	586	0.00%
7	3,703	3,602	101	97.3%
8	10,610	8,461	2,149	79.7%
9	5,804	5,491	313	94.6%
10	5,114	4,351	763	85.1%
11	6,780	5,868	912	86.6%

TABLE 2
Georgia's Congressional District Lines: Contiguity with Traditional Political Jurisdictional Boundaries

[Boundaries in miles]

Cong. Dist.	Total Bdry.	Part on State Bdry.	Part on County Bdry.	Part on City Bdry.	Total % Contig. with State County or City Bdry.
1	754	292	643	15	82.2%
2	1,243	255	667	87	57.4%
3	773	39	493	45	65.3%
4	178	0	67	38	57.0%
5	140	0	94	53	79.0%
6	226	0	70	53	44.7%
7	404	120	351	22	90.3%
8	1,155	54	702	53	64.6%
9	488	238	442	16	90.6%
10	614	115	452	56	76.6%
11	1,184	206	785	78	71.1%